IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 83 of 1991
with
Civil Application No. 501 of 1993
with
SECOND APPEAL No 84 of 1991
with
Civil Application No. 897 of 1991
and
Civil Application No. 502 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GOVIND DAYAL

Versus

KANBI HIRA HARJI

Appearance:

MR PV HATHI for appellants in both appeals.

MR NAGIN N GANDHI for respondent in both appeals.

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision:25/10/1999

COMMON C.A.V. JUDGEMENT

1. Both these Second Appeals against the common judgment and decree dated 19.3.1991 recorded in Regular

Civil Appeal Nos.150 and 151 of 1982 by the learned District Judge, Bhavnagar District at the instance of the original plaintiffs were admitted for hearing on the following substantial questions of law:

"(1) In the facts and circumstances of the case, whether the lower appellate Court committed error of substantial question of law as to interpretation and application of the law of easement relating to easement of necessity, inasmuch as that the easement of necessity could only arise on severance of the compact block of land?

(2) On the facts and circumstances of the case, whether the lower Appellate Court misread and misconstrued the report of the Commissioner at Mark 18/1?"

2. Appellants of both the appeals were the original plaintiffs whereas respondent was the defendant. They are, therefore, hereinafter referred to as 'the plaintiffs' and 'the defendant' for the sake of convenience and brevity.

3. It may be appreciated that the plaintiffs filed Regular Civil Suit Nos.46 of 1979 and 11 of 81 claiming the right of easement and injunction against the land belonging to the defendant. The learned trial Judge consolidated both the suits and evidence in common was recorded and disposed of the suits by common judgment and decree. Likewise the learned District Judge also preferred to hear both the appeals together and disposed of the same by common judgment.

4. In the aforesaid backdrop now let us narrate the facts of the plaintiffs' case in nutshell.

4.1. The case of both the plaintiffs was that they have agricultural lands within the sim of village Ghanghali in Sihor Taluka, Bhavnagar District. Labhshanker Pandya and Premkunvar Pandya were having agricultural lands bearing S.No. 88 admeasuring 5 acres and 23 gunthas and S.No. 89/1 admeasuring 1 acre and 27 gunthas while Govindbhai Dayalbhai and Devrajbhai Mohanbhai were having their agricultural land bearing S.No.90 admeasuring 2 acres and 5 gunthas and S.No.87/3 admeasuring 2 acres and 24 gunthas. It was further case of the plaintiffs that towards the the west of their fields, the fields bearing S.Nos.107, 102, 106 and other

fields were situated and touching to the western borders of the field S.No.87 and 88, the field bearing S.No.107 was situated while touching to the western borders of field bearing S.No.89, 91 and 92 the field bearing S. No.102 was situated. The field bearing S.No.106 was situated touching to the southern border of S.No.107 and western border of S.No.102. It was further case of the plaintiffs that the fields bearing S.Nos.102 and 106 were situated touching to the southern border of the field bearing S.No.107 and the western border of S.No.106 and 107 were situated in one line. The field bearing S.Nos.107, 106, 105, 104 etc., were touching to the main road called Sihor-Ghanghali Road. It was the case of the plaintiffs that the field bearing S.No.107 belonged to Ramkrishna Dayaram. He sold out the said field on 19.5.1972 to Hirabhai Harjibhai, who is the defendant. Likewise, the field bearing S.No.106 belonged to Dalpatram Kashiram and Bhupatrai Kashiram Pandya and they sold that field to Hirabhai Harjibhai on 11.11.1975. For the purpose of ingress and egress to their respective fields, the plaintiffs used to pass-by the main road called Sihor-Ghanghali Road. Proceeding towards north by that road they used to reach upto the common border of S.No.106 and 107 belonging to defendant. Thereafter taking the eastern turn they used to enter into the field bearing S.No.107 and passing parallel to the southern border of the field bearing S.No.107 the plaintiffs used to enter into their field bearing S.No.88 and 89/1 and thorough the field bearing S.No.88 and 89/1, they used to go to their field bearing S.No.90 and 87/3, and since last many years, without any interruption, along with cart, bullock, plough, agricultural instruments they have been passing and repassing the said way. It was the case of the plainitiffs that after the defendant purchased the lands in 1972 and 1975, the defendant removed the hedge between the fields S.No.107 and 106 and ploughed both the fields removing the demarcating line i.e., hedge between the two fields, as a result of which their way has been ploughed and destroyed. The way was 10 to 11 ft. in width and about 1700 ft. in length. Thus the right acquired by way of an easement right was destroyed by the defendant and, therefore, the plaintiffs filed a suit being 7/78-79 before the Mamlatdar under Section 5 of the Mamlatdar Courts Act. The learned Mamlatdar at Sihor after hearing the parties on merits, rejected the suit on 8.3.1979. On 7.4.1979 the appellants in Second Appeal No.84 of 1991 and appellants in Regular Civil Appeal No.150 of 1982 filed Regular Civil Suit No. 46 of 1979 and appellants in Second Appeal No. 83 of 1991 and appellants in Regular Civil Appeal No. 151 of 1982 filed Regular Civil Suit No. 11 of 1981 praying inter alia for

declaration of easementary right over the agricultural land of the defendant and for permanent injunction restraining the defendant from interfering with the plaintiffs' right of way with cart, bullock and other agricultural implements over the land of the defendant.

4.2. The suits were resisted by the defendant by filing written statements inter alia contending that the suits were barred by limitation, principles of resjudicata and delay and laches. It was contended that in fact there was no cause of action to file the suits. It was further contended that the plaintiffs were having road from the otherside called Nesda Na Marg but to harass him they were wrongly claiming the way from his field. It was further contended in that at no time in past the plaintiffs passed through his field. It was denied that the plaintiffs have acquired right of way either by prescription or by way of necessity. Ultimately the defendant prayed that the suits may be dismissed.

4.3. The learned trial Judge framed issues, recorded evidence and after considering, appreciating and evaluating the same and after hearing learned advocates for the parties, recorded following conclusions:

(i) Plaintiffs have no right of way to their fields bearing Survey No. 88 and 89/1 through the southern shedha of the defendant's land bearing S.No. 107.

(ii) The plaintiffs have a way from the boundary of village Nesda.

4.4. On the aforesaid premises, the learned trial Judge by common judgment and decree dated 30.10.1982, dismissed both the suits by observing that plaintiffs are not entitled to declaration and permanent injunction as prayed for.

4.5. Aggrieved thereby plaintiffs in both the suits went in appeal before the learned District Judge, Bhavnagar, by filing two separate appeals being Regular Civil Appeal Nos.150 and 151 of 1982. The learned lower appellate Judge also on reappreciation and reevaluation of the evidence and submissions advanced at the bar, dismissed both the appeals by common judgment and decree dated 19.3.1991 by confirming the findings of the learned trial Judge. It is this judgment and decree whereby the concurrent findings of facts have been recorded by both the courts below, which is under challenge in these Second Appeals at the instance of the plaintiffs, on the

substantial questions of law which have been indicated hereinabove.

5. Before answering the substantial questions of law formulated in these Second Appeals, it may be noted that in the trial court the plaintiffs claimed the right of easement only on the ground of prescription but during the pendency of the appeals before the lower appellate Court, amendment was sought for introducing acquisition of right of easement by way of necessity. The said amendment was allowed and pursuant to the said amendment the ground of easement by way of necessity was incorporated in the memo of appeals. Both the parties elected not to lead further evidence. Therefore, learned lower appellate Judge heard the parties on the said point also and recorded judgment and decree by confirming the judgment and decree recorded by the trial court.

6. Now let us examine the substantial questions of law formulated by this Court at the time of admission of these Second Appeals.

7. The first substantial question of law, according to Mr. Hathi, learned advocate for the appellants, is that the learned lower appellate Judge has misread Section 13 of the Indian Easements Act, 1882 ('the Act' for short hereinafter) by holding that easement of necessity can arise only when there is severance of the compact block of land and the learned lower appellate Judge misread the evidence that there are many other fields on that side and neither of the occupants of these fields is passing through S.No.107. Every occupant on the eastern side does go to his field and that would show that the Nehra Marg shown in defence is usable.

7. To answer the aforesaid submission, let us first have a look at Section 13 of the Act. Section 13 of the Act reads as under:

"13. Easements of necessity and quasi-easements - Where one person transfers or bequeaths immovable property to another -

(a) If an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the

transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement; or

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons -

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless the different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (a), (c) and (e), are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee."

8. On having examined the contents of Section 13 of the Act, it is amply clear that the first condition which is required to be fulfilled is that an immovable property as such is conveyed which is so situated relatively that

it cannot be enjoyed without a particular privilege in or over the land of the grantor, the privilege is what is called the easement of necessity and the grant of it is implied and passes over without any express words. To put it differently, the easement of necessity can only arise on severance of tenement. When two tenements had never been owned by one owner, no easement of necessity can arise. It is also clear that a man cannot acquire a way of necessity if he has any other means of access to his land, howsoever inconvenient it may be, than by passing over his neighbour's soil. The easement of way claimed as a way of necessity can only be created where there is absolute necessity for it, and not when there is a possibility of finding out another way though at greater expenses. The sum and substance of easement of necessity therefore contemplates existence of one tenement in past and thereafter severance thereof and absolute necessity for the purpose of the part severed so as to make use and occupy the same. A mere convenience is not sufficient to claim the right as it is not the test of the easement of necessity.

9. On having bare look at the contents of Section 13 of the Act and the observations made hereinabove, if we examine the case on hand, admittedly the fields belonging to the plaintiffs and the defendant were not formerly the parts and parcel of one compact block belonging to one person. There is also no evidence that later on that compact block came to be divided, and certain portion fell to the share of their predecessor-in-title and later on to them. Ramkrishna Dayaram was owner of S.No.107. He was certainly not the owner of the fields S.No.88, 89, 90 and 87/3. Thus both the fields, namely, S.No.107 on one hand and the fields owned by the plaintiffs on the other hand, were never owned by one owner and, therefore, one of the essential ingredients to claim easement of necessity is absent. To claim right of easement by way of necessity both the properties must be owned by same owner is sine-qua-non which is not the case here and, therefore, right of way of easement by way of necessity cannot arise and cannot be claimed since both the properties were not owned by same owner and thereafter it was severed and it was separated by partition. It is also seen from the evidence that S.No.88 and 89/1 might have been owned by one person in past and they might have divided amongst other sharers later on but that cannot grant a right to pass and repass through the field bearing S.No.107 which was not at all in past a part and parcel of field bearing S.No.88 and 89/1.

10. Relying upon Ex.55, learned advocate Mr. Hathi

contended that there is a mention about the right of way through field S.No.107. On having perusal of Ex.55 it is seen that sale deed dated 16.10.1980 was executed under which field bearing S.No.142 was sold by Pandya Vrajlal Maganlal and others to Patel Devraj Mohan. The plaintiffs field suits before the Mamlatdar on 22.1.1979 and on 8.3.1979 and the Mamlatdar dismissed the suits. Looking to the dates of the institution of the suits and the execution of the deed, it is clear that to succeed in the suit already field on 7.4.1979, tricky averment about the right of way through the field bearing S.No.107 has been made.

11. It may also be appreciated that in the said sale deed defendant was neither transferee nor transferor. Since the defendant was not a party to the said deed whatever has been mentioned in the deed against his interest or right cannot affect him or bind him.

12. Relying upon Mark 64/1 which is a writing, Mr. Hathi has contended that the said writing is 30 years old and according to the plaintiffs that writing shows that once in past the lands were owned by one person but later on came to be divided and the learned trial Judge has not considered that document. If the learned trial Judge had considered it he would have definitely come to the conclusion that the said property belonged to same owner.

13. On having perusal of Mark 64/1 it is clear that the same is an instrument of partition but it cannot be admitted in evidence for want of registration. The documents which were to be exhibited must be registered. However, it is not registered and, therefore, it cannot be admitted in evidence. Therefore, the learned trial Judge has very rightly not exhibited that document in evidence. Apart from that, on scanning of Mark 64/1 it does not establish that land bearing S.No.107 belonging to defendant was once in past belonged to common ancestor or one person and when partition took place it came to be owned and occupied by different owners. Therefore it is clear that the land upon which the right of easement is claimed was not a part and parcel of the lands belonging to the plaintiffs. To put it differently, lands of the plaintiffs and defendant were not compact block of land owned by same owner.

14. In view of the above discussion, I am of the opinion that right of easement by way of necessity can arise only in the case of compact block of land and on severance thereof and in the instant case that aspect is missing and the plaintiffs have failed to prove it by

cogent evidence and also there is a right of way through Nehra Marg as observed by the learned appellate Judge, which is a finding of fact recorded by both the courts below and this concurrent finding of fact cannot be assailed in this second appeal. Therefore, the first substantial question of law on which the Second Appeals were admitted is answered in negative and against the plaintiffs.

15. So far as the second substantial question of law formulated by this Court is concerned, the same is with regard to misreading of evidence and misinterpretation and misconstruction of the report of the Court Commissioner at Mark 18/1 and now that substantial question of law is required to be considered.

16. The Court Commissioner was appointed and he prepared maps and notes. Learned appellate Judge has observed that the notes were not perfectly, clearly and completely made. Certain relevant facts are not noted in the report and, therefore, it is not safe or proper to accept the note as the gospel truth. The Commissioner has also not mentioned whether he personally went there or just remaining in the field bearing S.No.88 made the note. The defendant who was present when the Commissioner went to the site, refused to sign the notes because the defendant thought that notes were not prepared correctly and necessary signs were not taken into account. Therefore, the learned trial Judge and the learned appellate Judge refused to place reliance on the report of the Court Commissioner. The learned lower appellate Judge has observed that admittedly there were many other fields on that side and neither of the occupants of these fields is passing through S.No.107. Every occupant on the eastern side does go to his field and that would show that the Nehra Marg sited in defence is usable. According to me, the aforesaid concurrent finding of fact recorded by both the courts below cannot be assailed in this second appeal. Therefore the second substantial question of law formulated by this Court in these second appeals can never be called a question of law, much less a substantial question of law; on the contrary, it is a question of fact and concurrent finding of fact cannot be permitted to be reagitated while exercising powers under section 100 of the Civil Procedure Code ('the Code' for short hereinafter).

17. I am fortified in my above view by the judgment of the Honourable Apex Court in the case of Karnataka Board of Wakf v. Anjuman-E-Ismail Madris-Un-Niswan, (1999) 6 SCC 343, wherein the Honourable Supreme Court

has observed that concurrent findings of fact cannot be assailed in second appeal. In the case of Panchugopal Barua & Ors v. Umesh Chandra Goswami & Ors, JT 1997 (2) S.C. 554, the Honourable Apex Court has held that substantial question of law is sine-qua-non for exercise of jurisdiction under Section 100 of the Code. It was further held that generally speaking, an appellant is not to be allowed to set up a new case in second appeal or raise a new issue (otherwise than a jurisdictional one), not supported by the pleadings or evidence on the record and unless the appeal involves a substantial question of law, a second appeal shall not lie to the High Court under the amended provisions.

18. In view of the statutory provisions envisaged in Section 100 of the Code and as observed by the Honourable Supreme Court in Panchugopal's case (supra), the second substantial question of law which was formulated by this Court which is with respect to appreciation of evidence of the Court Commissioner cannot be called substantial question of law and the concurrent finding of fact recorded by both the courts below cannot be assailed in this second appeal. Hence the second substantial question of law is answered in negative and it also fails.

19. For the foregoing reasons, both the Second Appeals being devoid of merits are liable to be dismissed. Resultantly, both the Second Appeals fail and they are dismissed leaving the parties to bear their own costs.

20. Civil Application No.501 of 1993 and Civil Application No.502 of 1993 which are filed under Order 9 read with Section 151 of the Code with a prayer to appoint a Commissioner preferably an officer from the Land Records Department to make a local investigation of the lands in question particularly with regard to the existence of right of way available to the plaintiffs and to direct the Commissioner to make such investigation and to report the same to this Court within the time that may be stipulated is concerned, it goes without saying that in view of the judgment of the Honourable Supreme Court in Panchugopal's case (supra), the plaintiffs cannot be allowed to set up a new case in second appeal or raise a new issue (otherwise than a jurisdictional one) not supported by the pleadings or evidence on the record, both these civil applications are also liable to be rejected and accordingly they are rejected. No order as to costs.

21. The ad-interim injunction granted by order dated 14.6.1991 passed in Civil Application No. 897 of 1991, is hereby vacated. Rule is discharged. No order as to costs.

22. Learned advocate Mr. Hathi urged that stay granted earlier and which is operating till today may be extended for a further period of eight week hereof to enable the appellants to prefer appeal before the Honourable Apex Court. Learned advocate Mr. Gandhi for the defendant objected to granting of stay for any further period since the plaintiffs have failed to prove right of way and lost the matter throughout including in these Second Appeals. After having heard learned advocates for the parties, I am of the opinion that the stay granted earlier and remained in operation till today shall stand extended for a further period of four weeks hereof to enable the plaintiffs to approach the Honourable Supreme Court, if they wish to do so.

(karan)